STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2007
v	No. 269918 Wayne Circuit Court
BERNARD KELLY, Defendant-Appellant.	LC No. 05-012153-01

Before: Meter, P.J., and Talbot and Owens, JJ.

PER CURIAM.

After a jury trial, defendant Bernard Kelly was convicted of two counts of assault with intent to commit murder, MCL 750.83, and one count of possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. He received concurrent sentences of 225 to 360 months' imprisonment for the assault with intent to murder convictions and a consecutive sentence of two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. Facts

The complainant, Charity Smith, met defendant in 1999. Smith and defendant had a casual sexual relationship, and Smith became pregnant. Defendant repeatedly expressed his desire to not be a father. He asked Smith to have an abortion, told her that he hoped the baby would die *in utero*, and threatened to make her life miserable if she gave birth to the child. Defendant also threatened to kill both Smith and their child. Bravely, Smith chose to have the baby. She gave birth to their daughter, Amorie Smith, on April 14, 2000.

After Amorie's birth, Smith filed a petition to obtain child support. Genetic testing established that defendant was Amorie's father. Defendant signed an affidavit of parentage and was ordered to pay child support. The payments were deducted directly from his paychecks.

On February 19, 2002, defendant called Smith and threatened to kill her and Amorie because he did not want to pay child support. Smith ended the call, but defendant called back and screamed that he hoped that she and Amorie would die. Smith immediately called the police to report the incident and was told that an officer would contact her the following day. Approximately 25 minutes later, Smith was sitting on the floor of her bedroom, talking on the phone and watching Amorie play with the window blinds. Smith heard two taps and told

Amorie to get away from the window. As Amorie moved away from the window, a gun was fired through the window and into the room. Smith, who used her body to shield Amorie from the gunshots, was hit seven times. Smith could not see who fired the shots. She managed to call the police and hid in the bathroom with Amorie until they arrived. The shooter went to the front door and tried to kick it down, but fled when he heard police sirens. After this incident, Smith had no further contact with defendant.

Officers investigating the shooting recovered four .25 caliber shell casings outside Smith's bedroom window. Defendant's friend, Ivan Stepney, testified that defendant possessed a .25 caliber handgun. Stepney also claimed that defendant had told him on more than one occasion that he did not understand why a woman would have a child knowing that the father would not be in that child's life.

II. Request for Substitute Counsel

First, defendant argues that he was denied due process and his right to counsel of his choice when the trial court refused his request for substitute counsel. We disagree. We review the trial court's decision regarding defendant's right to the counsel of his choice for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). We defer to the trial court's judgment when the trial court chooses an outcome that falls within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A strong presumption exists that defendant received effective assistance of counsel, and defendant bears the burden of proving that his counsel's actions did not constitute sound trial strategy. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997), citing *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Both the United States and Michigan Constitutions guarantee the right to effective assistance of counsel in order to protect a criminal defendant's right to a fair trial. US Const, Am VI; Const 1963, art 1, § 20; *Strickland*, *supra* at 684. However, an indigent defendant is not entitled to choose his appointed counsel, and the decision to substitute counsel is within the trial court's discretion. *People v Russell*, 471 Mich 182, 192 n 25; 684 NW2d 745 (2004).

> "Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." [*People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001), quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).]

There is no indication that defendant had good cause to justify substitution of counsel, and there is no showing that counsel did not zealously advocate on his behalf. On the first day of trial, before the proceedings began, defense counsel indicated to the judge that although she was prepared for trial, defendant was not happy with her representation. However, defense counsel noted that she met with defendant, represented him during the preliminary examination and pretrial proceedings, interviewed the witness that defendant identified and determined that this potential witness's testimony was irrelevant to the case, and subpoenaed telephone records for the telephone numbers that defendant gave her, only to find that the records no longer existed. Despite receiving this representation, defendant argued that he would not receive a fair trial if he

continued to be represented by his present attorney, and that he did not have the opportunity to discuss picking a jury with his attorney. The trial court, he claimed, should have granted him an extension. However, matters of professional judgment and trial strategy are entrusted to the attorney. *Traylor*, *supra* at 463. Defendant is not entitled to a new attorney merely because his trial attorney failed to discuss jury selection with him. Further, defendant waited until the day of trial to raise this objection. A substitution of counsel at this point in the proceedings would have required delaying proceedings and rescheduling the trial, unreasonably disrupting the judicial process. Accordingly, the trial court did not abuse its discretion when it refused to substitute defendant's counsel on the day of trial.

III. Bindover

Next, defendant argues that the circuit court erred when it reversed the dismissal of his bindover and reinstated the charges against him. We disagree. A defendant must timely raise errors or irregularities concerning the preliminary examination before or at trial to preserve the issue for appeal. *People v Sparks*, 53 Mich App 452, 454; 220 NW2d 153 (1974). Because defendant failed to raise this issue below, it is not properly preserved for our review.[1] We review unpreserved claims for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"The primary function of a preliminary examination is to determine whether a felony has been committed and, if so, whether there exists probable cause to believe that the defendant committed the felony." *People v Hill*, 269 Mich App 505, 514; 715 NW2d 301 (2006). Probable cause exists when there is enough evidence for a person of ordinary caution and prudence to reasonably believe that the defendant is guilty. *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003). The magistrate must examine the whole matter to determine whether there is evidence establishing each element of the offense. *People v Hudson*, 241 Mich App 268, 278; 615 NW2d 784 (2000).

"'Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to support the bindover of the defendant if such evidence establishes probable cause.'" *People v Brown*, 239 Mich App 735, 741; 610 NW2d 234 (2000), quoting *People v Whipple*, 202 Mich App 428, 431-432; 509 NW2d 837 (1993). If probable cause exists, defendant must be bound over for trial. MCL 766.13 provides in part:

> If it shall appear to the magistrate at the conclusion of the preliminary examination that a felony has been committed and there is probable cause for charging the defendant therewith, the magistrate shall forthwith bind the defendant to appear before the circuit court of such county, or other court having jurisdiction of the cause, for trial.

[1] Although defendant claims that he preserved this issue by raising it in his August 8, 2005, brief, a copy of this brief was not included in the trial court record or otherwise provided to this Court.

A magistrate must not refuse to bind a defendant over for trial when the evidence "conflicts or raises reasonable doubt of the defendant's guilt" because questions of fact are for the factfinder to resolve. *Hudson*, *supra* at 278.

The elements of assault with intent to commit murder are: "'(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.'" *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005) (citation omitted). We consider the following factors when determining whether a defendant had the specific intent to kill:

> "[1] the nature of the defendant's acts constituting the assault; [2] the temper or disposition of mind with which they were apparently performed, [3] whether the instrument and means used were naturally adapted to produce death, [4] his conduct and declarations prior to, at the time, and after the assault, and [5] all other circumstances calculated to throw light upon the intention with which the assault was made." [*People v Taylor*, 422 Mich 554, 568; 375 NW2d 1 (1985), quoting *Roberts v People*, 19 Mich 401, 415-416 (1870).]

A factfinder may reasonably infer the intent to kill from any facts in evidence. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *Id*.

A defendant is guilty of felony-firearm if he "carries or has in his [] possession a firearm when he [] commits or attempts to commit a felony . . . ." MCL 750.227b(1). If sufficient evidence exists to find a defendant guilty of assault with intent to murder, this offense may serve as the underlying felony for a felony-firearm conviction. *People v Guiles*, 199 Mich App 54, 58-59; 500 NW2d 757 (1993).

The circuit court did not err when it concluded that the district court abused its discretion by not binding defendant over for trial on the charges. The circumstantial evidence that, after four months without contact, defendant called Smith and vehemently threatened to kill her and Amorie, and then less than half an hour later, gunshots were fired through the window into Smith's bedroom where Amorie had been playing, was sufficient to establish probable cause that defendant was the shooter. In addition, evidence was presented indicating that defendant owned a handgun with the same caliber as the shell casings found outside the window. Further, after considering defendant's numerous threats, his anger at Smith for having Amorie and then garnishing his wages for child support, and then shooting through the window into Smith's bedroom, where Amorie was playing, a person of ordinary caution and prudence could reasonably believe that defendant intended to kill Smith and Amorie and used a firearm in the execution of his plan. The circuit court properly concluded that there was probable cause that defendant committed the charged offenses and that the district court erred when it refused to bind defendant over on these charges.

IV. Constitutional Challenges to Reinstatement of Charges Against Defendant

Defendant's argument that his constitutional rights were violated when he did not receive a second preliminary examination after the charges were reinstated is without merit. The right to

a preliminary examination is a statutory right. MCL 767.42; *People v Jones*, 195 Mich App 65, 66-67; 489 NW2d 106 (1992). Because the evidence presented at the first preliminary examination was sufficient to establish probable cause that defendant committed the charged offense and to bind defendant over for trial, defendant received what he was entitled to receive under the statute, and the district court was not required to hold another preliminary examination. *Jones*, *supra* at 67-68.

Defendant's argument that reinstatement of the charges constitutes harassment, violating his right to due process, also lacks merit. "[R]epeated prosecutions of a defendant for the same offense violate the defendant's right to due process . . . ." *People v Vargo*, 139 Mich App 573, 578; 362 NW2d 840 (1984). Often, a due process violation occurs when the prosecutor attempts to reinstitute charges without presenting additional, noncumulative evidence not introduced at the first preliminary examination, or when charges are reinstated in order to harass defendant or to judge-shop to obtain a favorable ruling. *Id.* However, these circumstances were not present in this case. Instead, these charges were reinstated in response to the circuit court's ruling regarding the prosecutor's challenge to the district court's refusal to bind over defendant on the charges at issue in this case. The appropriate method for a prosecutor to follow to challenge a magistrate's refusal to bind over a defendant is to appeal the decision to the circuit court. *People v George*, 114 Mich App 204, 208-209; 318 NW2d 666 (1982). The prosecutor did so in this case. Therefore, the circuit court's order reversing the district court's holding, and the district court's subsequent bindover of defendant on the charged offenses, does not constitute repeated prosecution or harassment, and defendant was not denied due process.

V. Other Acts Evidence

Next, defendant argues that the trial court erred in admitting other acts evidence pursuant to MRE 404(b). We disagree. We review trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

MRE 404(b) governs the admissibility of evidence of "other crimes, wrongs, or acts." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). "Evidence of extrinsic crimes, wrongs, or acts of an individual generally is inadmissible in a criminal prosecution to prove that the defendant possessed a propensity to commit such acts." *People v Hall*, 433 Mich 573, 579; 447 NW2d 580 (1989). The purpose of this rule is to prevent a "'conviction based upon a defendant's history of other misconduct rather than upon the evidence of his conduct in the case in issue.'" *Starr*, *supra* at 495, quoting *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982). However, an exception exists where "the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000).

To be admissible, evidence of other bad acts must be offered under something other than a character or propensity theory, it must be relevant under MRE 402, and its probative value must not be substantially outweighed by unfair prejudice under MRE 403.[2] *People v Knox*, 469

[2] "[T]he trial court, upon request, may provide a limiting instruction under MRE 105." *Knox*, (continued…)

Mich 502, 509; 674 NW2d 366 (2004). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Prior acts evidence is expressly admissible to establish motive. MRE 404(b)(1); *People v Hoffman*, 225 Mich App 103, 105; 570 NW2d 146 (1997).

Defendant argues that testimony regarding his interactions with Charleen Bellue and their daughter, Stephanie, constituted impermissible prior bad acts evidence and served merely to encourage the jury to convict him based on his prior misconduct. However, this evidence was properly admitted to identify defendant and to establish his motive for shooting Smith and Amorie.

The circumstances surrounding the two shootings were nearly identical. Bellue testified that once she became pregnant, defendant broke off all contact with her. After Stephanie Bellue was born on February 24, 2001, defendant refused to financially support her. Defendant signed an affidavit of parentage after DNA testing determined that he was Stephanie's father. Defendant also urged Bellue to reach a support agreement with him outside the court system, and she initially she agreed. However, in April 2004, Bellue filed a complaint for support.

On September 27, 2004, the day before the child support hearing, defendant saw Bellue at a red light and indicated that he wanted to talk. Defendant told her that he could not afford to have child support payments taken from his paycheck and urged Bellue to let him pay her outside the court system. Bellue did not agree to the arrangement, telling defendant that she did not trust him.

The following morning, Bellue dropped Stephanie off at daycare. Annette Rice, the operator of the daycare, testified that a man, later identified as defendant, came to the door to inquire about the daycare. After Rice spoke with defendant for approximately 20 minutes, he asked if he could see the areas where the children were. Rice allowed defendant to look into the room where the children were, including Stephanie. Rice and defendant returned to the front room and continued talking. Defendant asked if he could look into the room where the children were once more. Rice turned, and defendant shot her three times in the back. He ran past Rice into the room where the children were, and Rice heard screaming and more gunshots. Defendant returned to the front room, shot Rice in the right arm, and again returned to the room where the children were. Rice tried to scoot along the floor to get to the bathroom, but defendant returned and shot her in the left arm. At some point when defendant was in the room with the children, he killed Stephanie.

The testimony regarding the daycare shooting was relevant because it demonstrated that, although Smith could not identify defendant as the shooter, the circumstances surrounding the two shootings were nearly identical, and that defendant had the same motivation to kill both Stephanie and Amorie, namely, to avoid paying child support. Therefore, this evidence was offered for a proper purpose because it showed more than defendant's propensity to commit violent acts, it demonstrated a motive for the crime, and it established that defendant had a

(…continued)

supra at 509.

common scheme or plan in committing these offenses. This evidence was relevant to identify defendant as the shooter, and its probative value was not substantially outweighed by the potential for unfair prejudice. The trial court did not abuse its discretion when it admitted this testimony.

VI. Prosecutorial Misconduct

Defendant argues that the prosecutor committed misconduct by assassinating defendant's character and by vouching for Smith's credibility. We disagree. "Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, defendant failed to preserve this issue at trial because he did not challenge the prosecutor's remarks, depriving the trial court of the opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We review unpreserved claims of constitutional error for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

"Generally, '[p]rosecutors are accorded great latitude regarding their arguments and conduct.' They are 'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted). "We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A prosecutor may fairly respond to an issue or argument raised by the defendant. *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995).

In her opening statement, the prosecutor noted that defendant had two daughters, did not want to support either daughter financially, and was upset that child support payments were taken directly from his paychecks. He ranted to the mother of each daughter regarding the paycheck deductions and threatened to kill each daughter shortly before each shooting. In her closing argument, the prosecutor noted the close timing in each case between defendant's conversations with each mother regarding child support and the respective shootings. The prosecutor argued that defendant was motivated to commit each crime because he did not want to pay child support by having deductions taken from his paycheck. The prosecutor's arguments were supported by the evidence presented at trial and, therefore, did not constitute misconduct.

Defendant also challenges the propriety of the prosecutor's questions concerning his anger regarding his required child support payments. We review a prosecutor's line of questioning to determine whether the prosecutor elicited the challenged testimony in a good-faith effort to admit evidence. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). Reversal is warranted if improper questioning resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

The prosecutor's questions that elicited testimony regarding defendant's anger over the child support payments coming directly from his paychecks were relevant to the case. Again, "relevant evidence is any fact that is of consequence to the determination of the action." *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). See MRE 401. The elicited testimony

indicated that defendant had a motive for wanting to kill his child, specifically, to eliminate the financial burden of supporting her. Further, the prosecutor's argument that this was defendant's motive may reasonably be inferred from the evidence presented.

Defendant also contends that the prosecutor impermissibly vouched for Smith's credibility. However, defense counsel attacked Smith's credibility and the truthfulness of her testimony during defendant's closing argument. The prosecutor fairly responded to this attack in her rebuttal argument, stating that if Smith were a liar, she would have said that she saw defendant shoot at her and Amorie. Considering the surrounding circumstances, the prosecutor's remarks were not improper.

The prosecutor also summarized how the evidence presented at trial supported Smith's account of the events surrounding the shooting. A prosecutor may argue that a witness is or is not worthy of belief based on the facts. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Accordingly, the prosecutor's statement that Smith's testimony was truthful does not constitute misconduct.

Regardless, the trial court properly instructed the jury that the prosecutor's questions and arguments were not evidence, that the jury alone was the finder of facts, including credibility determinations, and that it must not let sympathy or prejudice influence its decision. Any possible error was dispelled by the trial court's instruction. See *Bahoda*, *supra* at 281. Accordingly, the prosecutor's questions and remarks did not deprive defendant of a fair trial.

VI. Speedy Trial

Next, defendant claims that he was denied due process by the delay between his arraignment and trial. We disagree. To preserve the issue for appeal, a defendant must make a formal demand for a speedy trial on the record. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Because defendant failed to make the necessary formal demand, this issue is unpreserved, and we review it for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

Criminal defendants are guaranteed the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; MCR 6.004(A). "In determining whether a defendant has been denied the right to a speedy trial, we balance the following four factors: (1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *People v Cleveland Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006). Prejudice is presumed if the delay is 18 months or more. *Id.* at 262. This presumption also triggers an inquiry into the other factors and shifts the burden to the prosecution to show that no injury resulted from the delay. *Id.* "The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest." *Id.* at 261. "A formal charge against, or restraint of, the accused is necessary to call the right to speedy trial into play." *People v Rosengren*, 159 Mich App 492, 506 n 16; 407 NW2d 391 (1987), citing *United States v Marion*, 404 US 307; 92 S Ct 455; 30 L Ed 2d 468 (1971). "[A] defendant's right to a speedy trial is not violated after a fixed number of days." *Cleveland Williams*, *supra* at 261.

A defendant may suffer from two types of prejudice: prejudice to his person and prejudice to the defense. *Cleveland Williams*, *supra* at 264. "[T]he most serious inquiry is

whether the delay has impaired defendant's defense." *Rosengren*, *supra* at 508. General allegations of prejudice, such as loss of memory, financial burden, or anxiety, are insufficient to establish that a defendant was denied his right to a speedy trial. *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). Delays inherent in the court system, such as docket congestion, although technically attributable to the prosecution, "are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial." *Id.* at 460, quoting *People v Wickham*, 200 Mich App 106, 111; 503 NW2d 701 (1993). The delay between a dismissal without prejudice and the reinstatement of the charge is not attributed to either party because there is no charge pending against a defendant during that time. *Wickham*, *supra* at 111. The defendant is charged with the time spent to adjudicate defense motions. *Gilmore*, *supra* at 461. A defendant's failure to timely assert his right weighs against a finding that he was denied a speedy trial. *Wickham*, *supra* at 112.

Defendant was arrested for the present offenses on March 1, 2005. His first preliminary examination was scheduled for March 14, 2005, but was postponed until March 17, 2005, at defense counsel's request so she could meet with defendant to review discovery. At the conclusion of the preliminary examination, the district court judge decided that there was insufficient evidence to link defendant to the February 19, 2002, shooting and refused to bind defendant over for trial. The case was dismissed without prejudice.

The prosecutor then appealed the district court's decision before the circuit court. The circuit court reinstated the charges and, on remand, the prosecutor again moved to bind defendant over on these charges. On November 29, 2005, pursuant to the order from the circuit court, the district court bound defendant over for trial on the present charges and scheduled the arraignment for December 6, 2005. The trial began on March 13, 2006.

No presumption of prejudice exists in this case because the time between defendant's arrest and the start of the trial was just over 12 months, well within the 18-month presumption period. See *Cleveland Williams*, *supra* at 262. Therefore, defendant must establish prejudice. *Cain*, *supra* at 112. Defendant concedes that he did not suffer personal prejudice from incarceration before trial because he was already incarcerated for a prior conviction. Defendant also does not allege that he suffered prejudice in his defense. Defendant merely contends that he suffered prejudice in the form of anxiety and concern. "[A]nxiety, alone, is insufficient to establish a violation of defendant's right to a speedy trial." *Gilmore*, *supra* at 462. Accordingly, defendant has failed to meet his burden to show that he was denied his right to a speedy trial.

Defendant also asserts that the delay between his arraignment and trial violated the 180-day rule. The 180-day rule requires the prosecutor to make a good-faith effort to bring a prison inmate who has a pending criminal charge to trial within 180 days after the Department of Corrections delivers notice to the prosecutor of the inmate's imprisonment and requests disposition of the pending charge. MCL 780.131(1); *People v Bradshaw*, 163 Mich App 500, 505; 415 NW2d 259 (1987). "[T]he statute applies only to those defendants who, at the time of trial, are currently serving in one of our state penal institutions, and not to individuals awaiting trial in a county jail." *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). The purpose of the statute is to give defendant "an opportunity to have the sentence run concurrently consistent with the principle of law disfavoring accumulations of sentences." *Cleveland Williams*, *supra* at 252-253.

"This Court has held that time expended by a prosecutor to pursue an interlocutory appeal from an order of a trial court is not chargeable to the prosecutor." *Bradshaw*, *supra* at 505. The delay in the reinstatement of charges and commencement of trial were a result of the prosecutor's appeal of the district court's decision not to bind over defendant, and the time spent pursuing this appeal cannot be counted toward the 180-day time period. The prosecutor made a good-faith effort to bring this case to trial and the trial began within the statutory period. Defendant's argument lacks merit.

VII. Arraignment

Next, defendant argues that his due process rights were violated because he was denied both an arraignment on the warrant and an arraignment on the information after the charges were reinstated. We disagree. Because defendant failed to raise this issue before the trial court, it is not preserved for our review. See *People v Crawford*, 429 Mich 151, 156-157; 414 NW2d 360 (1987). Accordingly, we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

Defendant was arrested pursuant to a warrant, was arraigned on March 1, 2005, and pleaded not guilty to the charges. Defendant's first preliminary examination was scheduled for March 14, 2005, but was postponed until March 17, 2005, at defense counsel's request, so she could meet with defendant to review discovery. At the conclusion of the preliminary examination, the judge refused to bind defendant over for trial. The prosecutor appealed the district court's decision to the circuit court and moved the circuit court to reinstate the charges against defendant. The circuit court reversed the district court's decision and remanded the case, and on November 29, 2005, the district court bound defendant over for trial and scheduled the arraignment on the information for December 6, 2005. The trial began on March 13, 2006.

Defendant alleges that he was not present for the preliminary examination on November 29, 2005, or for the subsequent arraignment. However, nothing in the trial court record indicates that defendant was not present at the hearing. Instead, the record indicates that the examination date was moved from November 15, 2005, to November 29, 2005, so defendant could attend the proceeding. Finally, the record indicates that the trial court also scheduled an arraignment on the information, and defendant admitted at sentencing that he was present at this arraignment. Because defendant received the arraignment on the warrant, preliminary examination, and arraignment on the information that he was entitled to receive under due process, his assertion of error lacks merit.

VIII. Prearrest Delay

Defendant argues that the delay between the commission of the present offense and his arrest for these crimes constituted a denial of his right to procedural due process. We disagree. We review a challenge to prearrest delay de novo. *Cain*, *supra* at 108.

The right to due process provides limited protection to individuals who have not been arrested. *People v Adams*, 232 Mich App 128, 133; 591 NW2d 44 (1998), quoting *People v Bisard*, 114 Mich App 784, 788; 319 NW2d 670 (1982). Charges against a defendant may be dismissed because of prearrest delay if there is "actual and substantial prejudice to the

defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage." *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). Substantial prejudice occurs when the delay meaningfully impairs a defendant's ability to defend against the charges. *Id*. To establish actual and substantial prejudice impairing his ability to defend himself, a defendant must first present evidence of prejudice. *Adams*, *supra* at 135, quoting *People v Loyer*, 169 Mich App 105, 120; 425 NW2d 714 (1988). Once evidence of prejudice has been established, the prosecution has the burden of persuasion of showing the reasonableness of the delay. *Adams*, *supra* at 137. "[T]o prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *United States v Lovasco*, 431 US 783, 796; 97 S Ct 2044; 52 L Ed 2d 752 (1977).

Defendant argues that the delay in his arrest prevented him from obtaining phone records and producing an alibi witness. In particular, defendant also claims that his alibi witness, Mike McClendon, would have testified regarding Smith's threats and defendant's location at the time of the incident, but he has since died.

However, defendant's allegations of prejudice resulting from pretrial delay are too speculative to justify reversing his conviction. Defendant fails to indicate the nature of these phone records or explain how they would have changed the outcome of the trial. Defendant also fails to specify what McClendon's testimony would have been. "Proof of 'actual and substantial' prejudice requires more than just generalized allegations." *Crear*, *supra* at 166. Defendant has failed to meet his burden of showing that he suffered actual and substantial prejudice by the delay in his arrest. His assertions of error lack merit.

IX. Right to be Present at Trial

Defendant argues that the trial court improperly denied his right to be present at trial. We disagree. Defendant waived this issue by behaving in a disorderly fashion before trial, refusing to be quiet after multiple warnings, and affirmatively responding that he did not want to be present in the courtroom. "'Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right."'" *Carines*, *supra* at 762 n 7, quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). If a defendant waives his rights, rather than forfeits them, that waiver extinguishes any error, and he may not seek appellate review of a claimed deprivation of those rights. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Because defendant intentionally relinquished his right to be present at trial, he has waived this claim of error and we need not consider it further.

X. Suppression of Evidence

Defendant claims that the prosecutor suppressed evidence that would have been favorable to the defense. We disagree. Because defendant presents this issue for the first time on appeal, we review it for plain error affecting his substantial rights. *Carines*, *supra* at 763-764.

"[T]he prosecutor has a duty to see that justice is done, not merely to convict." *People v Florinchi*, 84 Mich App 128, 133; 269 NW2d 500 (1978). Accordingly, defendant is entitled to

have all evidence bearing on his guilt or innocence that is within the prosecutor's control produced at trial. *Id.* at 133. A prosecutor violates a defendant's right to due process if he suppresses material evidence favorable to the defendant, even if she did not do so in bad faith. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). To establish that his due process right to access evidence presented by the prosecution was violated, a defendant must establish the following:

> (1) that the state possessed evidence favorable to the defendant; (2) that [the defendant] did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome if the proceedings would have been different. [*People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998) (citation omitted).]

The prosecutor also has a duty to disclose any information that would materially affect the credibility of her witnesses. *Id.* at 281. "In general, impeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely effect on the witness' credibility would have undermined a critical element of the prosecutor's case." *Id.* at 282-283. Defendant alleges that the prosecutor possessed a tape seized from his home with a recording of Smith calling him after the incident and yelling at him for shooting her. However, defendant relies on a transcript from a motion hearing concerning a separate offense, in which the prosecutor, defense counsel, and judge in that case discussed whether the tape should be admitted. This transcript is not a part of the trial court record in this case, and defendant cannot expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Accordingly, defendant fails to establish that the prosecutor suppressed evidence that would have been favorable to his defense.[3]

XI. Ineffective Assistance of Counsel

Finally, defendant argues that he was denied the effective assistance of counsel. We disagree. Although defendant filed a post-judgment motion for a new trial, the trial court denied this motion. Accordingly, our review of this issue is limited to the existing record. See *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). Whether defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We must first determine the facts and then decide whether these facts constitute a violation of defendant's constitutional right to effective assistance of counsel. *Id.* We review a trial court's findings of fact for clear error, but we review constitutional determinations de novo. *Id.*

There is a strong presumption that defendant received effective assistance of counsel, and defendant bears the burden of proving that his counsel's actions did not constitute sound trial strategy. *Strickland*, *supra* at 689; *Mitchell*, *supra* at 156. To establish a claim of ineffective

[3] Regardless, defendant has not shown how this tape would have been favorable to his defense.

assistance of counsel, defendant must establish that his counsel made errors that were so serious that she was not functioning as the "counsel" guaranteed for defendant by the Sixth Amendment, and that these errors deprived defendant of a fair trial. *Strickland*, *supra* at 687; *Mitchell*, *supra* at 156. Defendant must also show that, but for trial counsel's errors, the outcome of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994).

First, defendant argues that his counsel was ineffective for failing to investigate, prepare, and present an alibi defense. Defendant alleges that Tracey Poteat, the mother of his son, could have testified that he was at her home at the time of the February 19, 2002, shooting. Defense counsel indicated that she had interviewed the only witness that defendant identified (presumably Poteat) and determined that her testimony was irrelevant to the case. This decision by defense counsel not to call Poteat as a witness constitutes trial strategy, and we will not substitute our judgment for that of counsel in matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Accordingly, defense counsel's failure to investigate, prepare, and present an alibi defense did not constitute ineffective assistance of counsel.

Next, defendant claims that his counsel was ineffective because she only met with him once before trial, for approximately five minutes. However, defense counsel noted on the record that before trial began, she met with defendant, interviewed the witness that defendant identified, and subpoenaed phone records for the numbers that defendant gave her, merely to find that the records no longer existed. Defense counsel has a duty to consult with a defendant regarding important decisions, such as the overall defense strategy, but this obligation "does not require counsel to obtain the defendant's consent to 'every tactical decision.'" *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551; 160 L Ed 2d 565 (2004), quoting *Taylor v Illinois*, 484 US 400, 417-418; 108 S Ct 646; 98 L Ed 2d 798 (1988). Defendant failed to establish that his counsel did not fulfill her obligation to consult with him.

Defendant also alleges that his counsel failed to advise him regarding his right to testify at trial. However, the record shows that defense counsel advised defendant of this right, and defendant told the court that he did not want to testify. Defendant's assertion of error lacks merit.

Finally, defendant alleges numerous errors that have already been addressed, including his counsel's failure to challenge the reinstatement of the charges, the delay between the commission of the charged offense and his arrest, the 180-day rule violation, prosecutorial misconduct, and his removal from the courtroom, and his counsel's failure to secure defendant's presence at the arraignment and subsequent preliminary examination and to communicate with defendant after his removal from the courtroom. We previously concluded that defendant's arguments regarding these issues lack merit. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Accordingly, defense counsel's performance did not fall below an objective standard of reasonableness, and defendant was not deprived of a fair trial.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Donald S. Owens